

STATE OF MICHIGAN

Attorney Discipline Board

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In the Matter of the Reinstatement Petition
of Phillip E. Smith, P 20700,

Petitioner/Appellant.

Case No. 08-165-RP

Decided: January 21, 2010

Appearances:

Carl J. Marlinga, for Petitioner (before the hearing panel)
Thomas W. Hall, Jr., for Petitioner/Appellant (before the Attorney Discipline Board)
Emily A. Downey, for Grievance Administrator/Appellee

BOARD OPINION

Petitioner, Phillip E. Smith, was licensed to practice law in Michigan in 1958. His license was revoked, effective August 22, 1985, following his conviction in the Livingston County Circuit Court for the crime of embezzlement over \$100.00, a felony. *Grievance Administrator v Phillip E. Smith*, Case No. DP 4/84. When the revocation order was entered, petitioner's license had been continuously suspended since November 4, 1981, the effective date of a 120 day suspension ordered by the Attorney Discipline Board, based upon a hearing panel's finding that petitioner had neglected a personal injury case resulting in prejudice to the client and had neglected a probate estate for several years resulting in monetary damages to the estate. *Grievance Administrator v Phillip E. Smith*, ADB Case No. 35166-A. During the interim period between that suspension and the revocation of his license, petitioner was also the subject of another discipline order suspending his license for 30 months, effective May 10, 1983, for continuing to engage in the practice of law and holding himself out as an attorney in good standing in violation of the previous suspension order. *Grievance Administrator v Phillip E. Smith*, Case Nos. DP 65/82; DP 123/82.

The petition for reinstatement filed in this matter on November 20, 2008, represents petitioner's second attempt to return to the active practice of law.¹ The present reinstatement petition was filed with the clerk of the Michigan Supreme Court on November 20, 2008, and assigned to Tri-County Hearing Panel #82. In lieu of granting the Grievance Administrator's motion to dismiss the petition for reinstatement, the hearing panel ordered petitioner to provide copies of documents which were required to be submitted contemporaneously with the reinstatement petition. The public hearing on the reinstatement petition was conducted on March 16, 2009. The evidence presented at that hearing, along with the hearing panel's findings and conclusions forming the basis for its denial of the reinstatement petition, are set forth in the hearing panel's report filed July 21, 2009. (That report is attached to this opinion as an appendix.)

Petitioner now seeks review of the hearing panel's decision and the Board has conducted review proceedings in accordance with MCR 9.118. For the reasons set forth below, we affirm the hearing panel order of July 21, 2009, denying the petition for reinstatement.

As stated in prior opinions of the Attorney Discipline Board, including our recent opinion in *Matter of the Reinstatement of Gregory Wilkins*, Case No. 08-139-RP (ADB 2010),

The question before the Board in [a reinstatement] review proceeding is not whether there is evidentiary support in the record for petitioner's argument that he met his burden of proof under MCR 9.123(B)(4),(5),(6) and (7). It is well settled that in reviewing a hearing panel's decision, the Board must determine whether or not the *hearing panel's* decision has proper evidentiary support in the whole record. *In Re Reinstatement of Arthur R. Porter, Jr.*, 97-302-RP (ADB 1999), citing *In Re Reinstatement of Leonard R. Eston*, 94-78-RP (ADB 1195), and *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991).

An attorney seeking reinstatement from an order of revocation or a suspension of 180 days or more must establish each of the applicable criteria in MCR 9.123(B) by clear and convincing evidence. In this case, the hearing panel's findings that petitioner failed to meet that burden of proof are set forth in the panel's report filed July 21, 2009. Among other things, the panel noted petitioner's poor fiscal responsibility during the period of his disqualification, including a \$1,500.00 civil judgment assessed against him in 1995 that remains unsatisfied and petitioner's inability to

¹ Petitioner sought reinstatement in 2003. The hearing panel's order denying reinstatement was entered August 28, 2003, and affirmed by the Attorney Discipline Board in an order entered January 27, 2004.

comply, in his own licensing matter, with the procedural requirements involved in the filing of a petition for reinstatement.

Based upon our review of all of the testimony and exhibits presented to the hearing panel, we are satisfied that there is ample evidentiary support for the panel's conclusion that petitioner has failed to meet his burden of establishing eligibility for reinstatement by clear and convincing evidence by failing to establish the criteria listed in MCR 9.123(B)(5), (6) and (7).

Although not discussed in great detail in the panel's findings and conclusions, it must be noted that any consideration of the requirement in MCR 9.123(B) that a reinstatement petitioner must establish that his or her conduct since the order of discipline has been exemplary and above reproach, must take into account petitioner's two *additional* felony convictions subsequent to the revocation of his license in 1985. In 1989, petitioner was convicted of the crime of false pretenses, for accepting \$1,000.00 from a prison inmate's mother on the pretense that he could provide legal assistance to her son. Petitioner was sentenced to seven months in prison in that matter. The record discloses that petitioner was again convicted in 1995 of the crime of retail fraud for which, he testified, he was imprisoned for approximately 18 months.

It is undeniable that a significant period of time has elapsed since the revocation of petitioner's license to practice law in 1985 and, indeed, a relatively significant period of time has now elapsed since petitioner's third felony conviction in 1995. However, as the Board stated in *In Re Reinstatement of Arthur R. Porter, Jr., supra*, pp 8-9:

We have previously underscored the fact that the passage of the time specified in a discipline order or court rule, does not, in light of the other reinstatement requirements, raise a presumption that the disciplined attorney is entitled to reinstatement because she has "paid her debt" or he has "served his time."

Under the rules governing reinstatement proceedings the burden of proof is placed upon the petitioner alone. While the Grievance Administrator is required by MCR 9.124(B) to investigate the petitioner's eligibility for reinstatement and to report his or her findings in writing to the hearing panel, there is no express or implied presumption that a petitioner is entitled to reinstatement as long as the Administrator is unable to uncover damaging evidence. In this case, our finding . . . would be the same if the record were devoid of evidence tending to cast doubt upon his character and fitness since his suspension. [*Reinstatement of Arthur R. Porter*, citing *In Re Reinstatement of James Del Rio*, DP 94/86 (ADB 1987).]

Petitioner's closing statement to the hearing panel that "he has been punished enough" misses the point of this proceeding. Instead the question before the hearing panel, and now the Board, is whether petitioner can now be safely recommended to the public, the courts, and the legal profession as a person fit to be entrusted with the responsibilities and obligations that accompany the license to practice law. The hearing panel concluded that petitioner did not meet that test in this reinstatement proceeding. Based upon our review of the whole record, we affirm that decision.

Board members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, and Sylvia P. Whitmer concur in this decision.

Board Members James M. Cameron, Jr. did not participate.